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6 **UNITED STATES BANKRUPTCY COURT**  
7 **DISTRICT OF NEVADA**  
8

9 In re: ) Case No.: BK-S-11-26893-MKN  
10 **LAWRENCE A. GRIHALVA,** ) Chapter 7  
11 Debtor. ) Date: 8/28/2013  
Time: 2:30 p.m.  
12

13 **MOTION TO REOPEN CHAPTER 7 UNDER 11 U.S.C. §350 and F.R.B.P. 5010**  
14 **TO HOLD CREDITORS IN CONTEMPT AND FOR SANCTIONS FOR**  
15 **VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. §524(a)(2) AND**  
16 **FOR VIOLATING THE FAIR DEBT COLLECTION PRACTICE ACT AND THE**  
17 **NEVADA CONSUMER PROTECTION LAWS.**

18 COME NOW, Debtor, LAWRENCE A. GRIHALVA (“Debtor” or “Grihalva”) by and  
19 through his attorney, CHRISTOPHER P. BURKE, ESQ., and respectfully request this Court  
20 to Reopen Debtors Chapter 7 under 11 U.S.C. §350 and F.R.B.P. 5010 and to Hold Creditor,  
21 Nationstar Mortgage, LLC, (“Nationstar”) and its attorney, McCarthy and Holthus, LLP.,  
22 (“McCarthy and Holthus”) in Contempt and Sanction each of them for their Violation of the  
23 Discharge Injunction. 11 U.S.C. §524(a)(2). In addition, all should be sanctioned for  
24 violating the Fair Debt Collection Practice Act (“F.D.C.P.A”) 15 U.S.C. §1692 and the Nevada  
25 consumer protection statutes in NRS §598 and §41.600

26 Dated this 25 day of July, 2013.

27 /S/ CHRISTOPHER P. BURKE, ESQ.  
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I  
Law

On motion by the debtor, a case may be reopened in the court in which such case was closed to administer assets, accord relief to the debtor or for other cause. 11 U.S.C. USC §350(b) and Fed.R.Bankr.P. 5010. A discharge in a case operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor. 11 U.S.C. §524(a)(2).

## II

### Statement of Facts

Grihalva filed a chapter 13 on July 11, 2008, case No. 08-17519-MKN. That was dismissed on July 27, 2011. But during that case, Aurora Loan Services, LLC (“Aurora”), through McCarthy and Holthus, participated extensively by filing a proof of claim, motion to lift stay, two objections to confirmation and even defended an adversary. (Dkt#65, 89, 134, 151, 181)

After dismissal, Grihalva then filed this chapter 7 on October 27, 2011. Aurora Loan Services, LLC (“Aurora”) was listed on Schedule D as a secured credit for a home located at 3222 E. Viking Rd. Las Vegas, NV 89121 (“Viking Road.”). In addition, Aurora’s attorney McCarthy and Holthus was also listed. Both, were noticed of his 341 (Dkt.#11).

In Grihalva's chapter 7, McCarthy and Holthus also represented another secured creditor. The Bank of Mellon New York ("Bank of Mellon"). During the case, Bank of Mellon, through McCarthy and Holthus filed an opposition to Grihalva's motion to continue the stay. (Dkt.# 29). McCarthy and Holthus then filed, a motion to lift stay, for the Bank of Mellon on property located at 56 E. Serene unit 3-120 Las Vegas, Nevada. (Dkt.# 40) Then Aurora, also through its attorney McCarthy and Holthus, filed a motion to lift stay on his Viking Road. property. (Dkt. #44 ) On February 3, 2012 Grihalva received his discharge. Both Aurora and McCarthy and Holthus were noticed of it. (Dkt # 61).

More than one year later, on April 19, 2013 Nationstar, who now held the loan on

1 Viking Road sent Grihalva a letter regarding its loan. Nationstar's letter states, "you must  
 2 pay the full amount of the default on this loan by the thirty-fifth (35<sup>th</sup>) day from the date of  
 3 this letter...". (Ex. 'A') Though later on in its letter, Nationstar attempts to disclaim its  
 4 action if a bankruptcy was filed.

5 Then on or about June 27, 2013 Nationstar, through McCarthy and Holthus, LLP  
 6 filed suit against Grihalva in Clark Country District Court, case No. A-13-684232-C.  
 7 ("District Court case"). That lawsuit states, "Plaintiff [Nationstar] prays for judgment ...  
 8 Against Defendant, Laurence Grihalva, for the minimum sum of \$584,857.06, plus all pre  
 9 and post-filing costs and attorney's fees, and interest from December 1, 2007 until paid in  
 10 full...". (Ex. 'B')

11 This caused Grihalva, a private pilot, to take off from a job in New York, and fly to  
 12 Las Vegas, to file a response to the lawsuit. (Ex. 'C') In the process, losing several days of  
 13 work, not to mention the stress and emotional toll its taken.

14 **III  
 15 Issue**

16 Absent a reaffirmation agreement, a bankruptcy discharge eliminates a debtors  
 17 personal liability on a secured debt. Here, after Grihalva received his discharge, and despite  
 18 its attorney, McCarthy and Holthus having lifted the stay, Nationstar still sent him a  
 19 collection letter. Then filed a lawsuit seeking to hold him personally liable for its debt on  
 20 his home loan. Shouldn't Nationstar, and McCarthy and Holthus, be sanctioned for  
 21 violating the discharge injunction?

22 **IV  
 23 Argument  
 24 A**

**Both Nationstar and McCarthy and Holthus should be held in contempt for  
 25 Violation of the discharge injunction**

26 **1. Courts inherent contempt authority**

27 Article III courts have an "inherent authority" to sanction "bad faith" or "willful  
 28 misconduct", even in the absence of express statutory authority to do so. *Chambers v.*

1 *NASCO, Inc.*, 501 U.S.32, 42-47 (1991). Therefore, bankruptcy courts have inherent civil  
 2 contempt authority independent of any statute or rule. *Jove Eng'g, Inc., v. IRS*, 92 F.3d  
 3 1539, 1553 (11<sup>th</sup> Cir. 1996). Pursuant to its inherent civil contempt authority, bankruptcy  
 4 courts may enforce its orders, *see id.*; *In re Matthews*, 184 B.R. 594, 598 (Bankr. S.D. Ala.  
 5 1995), and issue sanctions for noncompliance, *Bessette v. Avco Fin. Services, Inc.*, 230 F.3d  
 6 439, 445 (1<sup>st</sup> Cir. 2000).

7 The discharge injunction contained in 11 U.S.C. §524 operate as an order of the court.  
 8 *Matthews* at 598. A bankruptcy court may therefore use its inherent civil contempt  
 9 authority to issue sanctions against creditors violating the automatic stay and discharge  
 10 injunction, which sanctions may include compensatory damages. *See, e.g., In re Wallace*,  
 11 2011 WL 1335822 at \*5 (Bankr. M.D. Fla. April 5, 2011) (stating that “[i]t is well settled that  
 12 this Court has the inherent power to award compensatory damages for willful violations of  
 13 the automatic stay as this falls within the ambit of the bankruptcy court’s civil contempt  
 14 power.”); *In re Hardy*, 97 F.3d 1384, 1389 (11<sup>th</sup> Cir. 1996)(noting that “the modern trend  
 15 is for courts to award actual damages for violation of §524 based on the inherent contempt  
 16 power of the court.”).

17 Here, both Nationstar and McCarthy and Holthus, knew of Grihalva’s bankruptcy  
 18 and discharge. But both still seek to hold him personally liable, one by letter, and both in  
 19 its District Court complaint. There is no excuse for McCarthy and Holthus action in filing  
 20 this suit. Especially after filing, at least four pleadings in his bankruptcy case. This is a clear  
 21 violation of §524(a)(2) and is deserving of sanctions.

22 **2. Courts have contempt authority under Section 105.**

23 In addition to its inherent civil contempt powers, bankruptcy courts have statutory  
 24 civil contempt authority under 11 U.S.C. §105(a) to enforce the automatic stay and discharge  
 25 provisions of the Bankruptcy Code. *See Bessette*, 230 F.3d at 445; *see also In re Fatsis*, 405  
 26 B.R. 1, 7 (B.A.P. 1<sup>st</sup> Cir. 2009). Section 105(a) provides for the issuance of “any order,

1 process, or judgment that is necessary or appropriate to carry out the provisions of this  
 2 title.”

3 The Ninth Circuit has held that Section 524(a) may be enforced by the court’s  
 4 contempt power under section 105(a). See *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502,  
 5 509 (9<sup>th</sup> Cir. 2002); see also *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9<sup>th</sup> Cir. 1996)  
 6 (noting that “[t]here can be little doubt that bankruptcy courts have the inherent power to  
 7 sanction vexatious conduct presented before the court” as recognized by the statutory grant  
 8 of power to the bankruptcy courts under 11 U.S.C. §105(a)). “The standard for finding a  
 9 party in civil contempt is well settled: The moving party has the burden of showing by clear  
 10 and convincing evidence that the contemnors violated a specific and definite order of the  
 11 court. The burden then shifts to the contemnors to demonstrate why they were unable to  
 12 comply.” *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9<sup>th</sup> Cir. 1999).

13 A party who knowingly violates the discharge injunction can be held in contempt  
 14 under § 105(a) of the Bankruptcy Code. *Espinosa v. United Student Aid Funds, Inc.*, 553  
 15 F.3d 1193, fn. 7 (9<sup>th</sup> Cir. 2008). Proof of a Knowing violation requires only proof that the  
 16 creditor (1) knew the discharge injunction was applicable and (2) intended the actions  
 17 which violated the injunction. *Bennett*, 298 F.3d at 1069; (citing *In re Hardy*, 97 F.3d at  
 18 1388-89). Therefore, the bankruptcy court clearly has discretion to impose sanctions under  
 19 section 105(a). *Bennett* at 1069. The focus “is not on the subjective beliefs or intent of the  
 20 contemnors in complying with the order, but whether in fact their conduct complied with  
 21 the order at issue.” *In re Dyer* 322 F.3d 1178, 1191 (9<sup>th</sup> Cir. 2003), citing *Hardy* at 1390  
 22 (regarding stay violation). “Because civil contempt serves a remedial purpose it matters not  
 23 with what intent the defendant did the prohibited act.” *Dyer* at 1191. “[T]he threshold  
 24 questions regarding the propriety of an award turns *not* on a finding of ‘bad faith’ or  
 25 subjective intent, but rather on a finding of willfulness’ ”. *Id* at 1191.

26 A “willful violation” does not require a specific intent. Rather, the statute provides  
 27 for damages upon a finding that the defendant knew of the bankruptcy and that the  
 28

1 defendant's actions were intentional. *In re Pinkstaff*, 974 F.2d 113, 115 (9<sup>th</sup> Cir. 1992)  
 2 (involving the automatic stay). "If the Bankruptcy Court finds that the creditor willfully  
 3 violated the injunction, it shall, at the very least, impose sanctions to the extent necessary  
 4 to make [Wik] whole." *Ibid.*; "Where the discharge injunction was willfully violated courts  
 5 award debtor's actual damages, punitive damages and attorneys' fees." *Ibid.*, citing 2 Collier  
 6 Bankruptcy Manual (3<sup>rd</sup> Rev. Ed.) ¶ 524.02 [2][c].

7 Thus, the Bankruptcy Court can sanction both Nationstar and McCarthy and Holthus  
 8 under its civil contempt authority.

### 9 **3. Damages and Attorneys Fees**

10 Bankruptcy courts may use their civil contempt authority under §105(a) to award  
 11 debtor compensatory monetary damages for violations of the automatic stay. *See Jove*  
 12 *Eng'g, Inc.*, 92 F.3d at 1554 (stating that for automatic stay violations, courts generally  
 13 award damages under § 105). And they may also award debtors compensatory monetary  
 14 damages, including actual damages, pursuant to § 105(a) for violations of the discharge  
 15 injunction. *See In re Meyers*, 344 B.R. 61, 66 (Bankr. E.D. Pa. 2006); *In re Perviz*, 302 B.R.  
 16 357, 370 (Bankr. N.D. Ohio 2003) (nothing that "most bankruptcy courts, when faced with  
 17 a willful violation of the discharge injunction, allow the debtor an award of actual damages  
 18 plus attorney fees."); *see also In re Distad*, 392 B.R. 482,487 (Bankr. D. Utah 2008) (stating  
 19 the court has statutory contempt authority under § 105(a) to award monetary relief for  
 20 violations of the discharge injunction).

21 "[B]ankruptcy courts across the country have appropriately used their statutory  
 22 contempt power to order monetary relief, in the form of actual damages, attorney fees, and  
 23 punitive damages when creditors have engaged in conduct that violates § 524." *Bessette* at  
 24 445. *See In re Harris*, 312 B.R. 591 (N.D. Miss. 2004); *In re Sanchez*, 372 B.R. 289 (Bankr.  
 25 S.D. Tex. 2007) (Section 105(a) gave court power to sanction creditor charging undisclosed  
 26 and improper fees); *In re Rizzo Cheverier*, 364 B.R. 532 (Bankr. S.D.NY 2007).

27 The Supreme Court has held, civil contempt orders serve either or both of two  
 28

1 purposes: (1) to compel or coerce obedience of court order; and (2) to compensate parties  
 2 for losses resulting from the contemptor's non-compliance with a court order. *United State*  
 3 *v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947).

4 Creditors have been found to have violated the discharge injunctive for various acts.  
 5 See *In re Adrus*, 189 B.R. 413 (N.D. Ill. 1995)(calling); *In re Burke* 200 B.R. 282 (Bankr.  
 6 S.D. Ga. 1996)(Collection letter). As a consequence, debtors have received actual damages,  
 7 emotional distress damages and attorney's fees. See *In re Curtis*, 322 B.R. 470  
 8 (Bankr.D.Mass 2005)(debtor awarded \$15,000.00 emotional distress damages and  
 9 \$30,000.00 punitive damages); *In re Atkins*, 279 B.R. 639 (Bankr.N.D.N.Y.  
 10 2002)(\$30,000.00 emotional distress); *In re Gervin*, 337 B.R. 854, 864 (Bankr.W.D.  
 11 Tex.2005)(\$25,000.00 emotional distress damages); *In re Goodfellow*, 298 B.R. 358  
 12 (Bankr. N.D. IA.2003)(debtor awarded \$5,000.00 actual and \$5,000.00 punitive  
 13 damages); *In re Faust*, 270 B.R. 310 (Bankr.N.D.Ga. 1998). *In re McCormak* 203 B.R. 521  
 14 (Bankr. D.N.H. 1996)(mortgage bank held liable for \$10,000.00 in punitive damages).  
 15 These are normal civil contempt sanctions. *In re National Gypsum*, 118 F.3d 1056 (5<sup>th</sup> Cir.  
 16 1997); see also 11 U.S.C. §105(a). Since the letters and correspondents seek to collect from  
 17 the Barrons, they are in contempt. 11 U.S.C §524(a)(2).

18 "In a civil contempt proceeding, a monetary sanction, assessed for the purpose of  
 19 compensating the complaint losses sustained by reason of the contemnor's acts, is within  
 20 the universe of permissible sanctions. Thus, make-whole relief is a commonplace sanction  
 21 in civil contempt. So too are. . . attorney's fees and cost". *Goya Foods, Inc. v. Wallach*  
 22 *Mgmt. Co.* 290 F.3d 63, 78 (1<sup>st</sup> Cir. 2002). "[D]amage awards are both necessary and  
 23 appropriate in the context of contempt for violation of discharge injunctions". *Gervin* at  
 24 858.

25 "Without the willingness of aggrieved debtors to prosecute violations of the discharge  
 26 injunction of section 524(a)(2), such violations would go unchecked by the court. The Code  
 27 has as one of its underlying purposes providing a fresh start to a discharge debtor." *In re*  
 28

1 *McClure*, 420 B.R. 655, 664 (Bankr. N.D. Tex. 2009), (citing *Marrama v. Citizens Bank*,  
 2 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) and *Grogan v. Garner*, 498 U.S.  
 3 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)).

4 “If violation of the discharge injunction go unpunished, creditors will lack the  
 5 necessary incentive to avoid violating the law, and underlying purpose of the Code will be  
 6 undermined. In order to ensure that debtors are not hesitant to prosecute violations of the  
 7 discharge injunction, they should be awarded actual damages to compensate them for the  
 8 time and effort they expend in the process.” *McClure* at 664, “Should creditors feel safe in  
 9 ignoring the discharge injunction, some debtors, especially if not represented - . . . may be  
 10 intimidated into paying discharged debts.” *Id* at 664. A Debtor shouldn’t be discouraged  
 11 from seeking to enforce her rights. And, in fact should be compensated when those rights  
 12 are violated, as has happened here.

13

**B**

14 **Nationstar and McCarthy and Holthus have also violated the FDCPA and**  
**Nevada consumer protection statutes.**

15 Alternatively, Grihalva seeks redress because the parties violated the “Fair Debt  
 16 Collection Practice ACT” (“FDCPA”). The FDCPA was enacted to regulate the collection of  
 17 debts. Attorneys are included amongst those it covers. *Heintz v. Jenkins*, 514 U.S. 291  
 18 (1991) (“The Act does apply to lawyers engaged in litigation...”).

19 Any attempt to collect, on an uncollectible debt violates the FDCPA. 15 U.S.C. §1692e  
 20 (2)(A). A violation entitles a debtor to actual damages, statutory damages and attorneys  
 21 fees. 15 U.S.C. §1692k(a)(2)(A). See *McCollough v. Johnson, Rodenburg & Lavinger, LLC*,  
 22 637 F.3d 939 (9<sup>th</sup> Cir. 2011) (\$1,000 statutory damages, \$250,000 emotional distress  
 23 damages and \$60,000 in punitive damages plus attorneys fees); *Ross v. RJM Acquisitions*  
 24 *Funding, LLC* 480 F.3d 493 (7<sup>th</sup> Cir. 2007). In turn, such a violation also triggers Nevada’s  
 25 own state consumer protection laws. NRS §41.600 (1), (2) and (3), section §598.0923(3)  
 26 and (4).

## V Conclusion

This case should be reopened. And Grihalva should be awarded damages, costs and fees because of both Nationstar and McCarthy and Holthus's actions.

WHEREFORE, Debtor respectfully requests an order,

1. Reopening Grihalva's case for the purpose of allowing Grihalva's Motion for Contempt for Violation of the Discharge Injunction to go forward;
2. Reimbursing him the fee to reopen of \$260;
3. Allowing Sanctions of \$ 10,000 each against both Nationstar, and McCarthy and Holthus;
4. Allowing Debtor actual damages, including his loss of wages of \$2,550, to be determined against both Nationstar and McCarthy and Holthus at an evidentiary hearing;
5. Allowing attorney fees of \$ 3,000<sup>1</sup> against both Nationstar and McCarthy and Holthus;
6. Requiring Nationstar to cease its lawsuit against Grihalva personally.
7. Alternatively, holding that both Nationstar and McCarthy and Holthus both violated the F.D.C.P.A. and each should pay actual damages, statutory damages and attorneys fees.

<sup>1</sup> Christopher P. Burke, Esq. will supplement this motion with a declaration for his attorney fees.

1       8. Holding that both Nationstar and McCarthy and Holthus, have violated Nevada's  
2 consumer protection statutes. See NR S 598.0915 et al. and he is entitled to actual  
3 damages, statutory damages and attorney fees against both.

4       9. Any other relief deemed just and proper.

5  
6       Dated, this 25<sup>th</sup> day of July, 2013

7       RESPECTFULLY SUBMITTED:

8  
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